

BANK BUMIPUTRA (M) BHD.

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v.

SYKT. KEJURUTERAAN HONG HUAT SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR

GUNN CHIT TUAN J

[SUIT NO. C23-485-86]

22 JULY 1988

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CIVIL PROCEDURE: Summary judgment application - Order 14 RHC 1980 - Whether bank had to enforce securities given before suing.

CONTRACT: Assignment - Whether absolute assignment or charge only - Whether bank's right to sue dependant on realisation of securities given.

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BANKING: Overdraft facilities - Secured by way of a charge - Joint and several guarantees by directors - Assignment of proceeds of project to bank.

By a loan agreement dated 11 October 1983 between the plaintiff and the 1st defendant, the latter was given an overdraft facility on RM2.8 million secured by way of a charge created by the 1st defendant in favour of the plaintiff together with a joint and several guarantee signed by the directors of the 1st defendant. The 1st defendant as further security executed 2 deeds of assignment which assigned to the plaintiff all the proceeds of the Malacca Seafront Reclamation project which the 1st defendant was undertaking. Instead of proceeding to enforce the securities the plaintiff issued a writ against the defendants claiming the sum of RM3,710,380.68, interest and costs.

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The plaintiff applied for summary judgment against the 1st, 4th and 5th defendants and the Senior Assistant Registrar dismissed the plaintiff's applications. The plaintiff appealed against the decision.

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Held:

[1] Whether or not an assignment is absolute within the meaning of s. 4(3) of the Civil Law Act 1956, is to be gathered from the four corners of the instrument itself.

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[2] Looking at the instrument as a whole the assignment was an absolute one but nevertheless by virtue of Clause 7 of the assignment, the plaintiff had the right to take legal action at any time against the defendants for the recovery of the debt without having to enforce the securities.

[Appeal against decision of Senior Assistant Registrar allowed.]

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Cases referred to:

Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd [1985] CLJ (Rep) 231

The Mercantile Bank of London Ltd. v. Evans [1899] 2 QB 613

Hughes v. Pumphouse Hotel Co. [1902] 2 KB 190

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Legislation Referred to:

Civil Law Act 1956, s. 4(3)

Other source referred to:

Chitty on Contract, 25 Edn., Vol. 1, (pp. 696 & 697) Not available in the blue book.

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- a* For the appellant/plaintiff - Abdul Razak b. Ibrahim; M/s. Razak Ibrahim & Co.
For the respondent/1st defendant - K. Balaguru; M/s. A.K. Lee & Co.

JUDGMENT

Gunn Chit Tuan J:

- b* By a summons-in-chambers dated 29 September 1986, Bank Bumiputra Malaysia Berhad (the plaintiff) applied for leave to sign final judgment against Syarikat Kejuruteraan Hong Huat Sdn. Bhd. (the 1st defendant) under O. 14 of the Rules of the High Court 1980. By another similar application by way of summons-in-chambers dated 18 November 1986, the plaintiff also applied for leave to sign final judgment against one Mohd. Sidi bin Maasim and Tan Wah Lye for RM3,710,380.68, interest thereon at the rate of 4.5% per annum above the plaintiff's base lending rate which was then 9.75% per annum with monthly rests from 1
- c* January 1986, to date of realisation and costs. Both applications were heard and dismissed by the learned Senior Assistant Registrar on 20 January 1987.

- By a loan agreement made on 11 October 1983, between the 1st defendant and the plaintiff, the latter agreed to grant to the 1st defendant an overdraft facility up to the limit of RM2,800,000 for principal only upon the terms and conditions appearing in the said agreement.
- d* As security, the 1st defendant created a charge under the National Land Code 1965 and also caused its directors to execute a joint and several guarantee. As further security for the overdraft facility the 1st defendant also executed two deeds of assignment in favour of the plaintiff under the terms of which it assigned to the plaintiff all the proceeds under a project undertaken by the 1st defendant known as Malacca Seafront Reclamation Project. However, instead of proceeding to enforce any of the securities, the plaintiff chose to issue a writ
- e* against the 1st defendant and four others claiming the said sum of RM3,710,380.68, with interest and costs.

- It was the contention of Encik Abdul Razak, Counsel for the plaintiff, that the said deeds of assignment were not absolute ones and the assignee could not maintain a suit against the assignor's debtors. He stated that the right to sue for the debts was not assigned and also contended that only part of the debts of RM12,000,000 and RM15,470,000 was assigned for
- f* the overdraft facilities granted up to a sum of RM2,800,000. Counsel referred to the former Federal Court case of *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] CLJ (Rep) 231 in which an assignment was executed in the following terms:

- That in consideration of the bank having agreed to grant the loan the assignor as beneficial owner hereby assigns absolutely to the bank all his rights title and interest in and to the said property and under the said sale agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same. (See Clause 1).
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In that case the Federal Court held that the document concerned was an absolute assignment not purporting to be a charge only within the meaning of s. 4(3) of the Civil Law Act as the instrument clearly purported and was intended in point of form to be an absolute assignment because of the use of the word "absolutely" in Clause 1 thereof.

- h* Counsel also referred to the English Court of Appeal case of *The Mercantile Bank of London, Limited v. Evans* [1899] 2 QB 613, 616 & 617. In that case an assignment dated 3 June 1897, was as follows:

- In consideration of your (plaintiffs) placing to my (Vansittarts) credit today the sum of 200 1., I (Vansittart) hereby assign to you the whole of my rights and interest under the agreement dated 1st June 1897... as security for the repayment on demand of the said sum of 200 1. ...
- i* and I hereby appoint you my nominees in pursuance of the provisions of the said agreement,

with power to exercise all my rights thereunder either in my name or your own, and I hereby appoint you my irrevocable attorneys in that behalf.

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A.L. Smith LJ stated that that seemed to him to show that the right of suing on the contract remained in the assignor. Vaughan Williams LJ also agreed that the assignment although expressed to be of the whole of the assignor's rights and interest under the agreement yet it did not purport to be an absolute assignment of the contract. Encik Abdul Razak pointed out that in this case there was no clause regarding the enforcement of all remedies and contended that the assignment was therefore by way of charge only within the meaning of s. 4(3) of the Civil Law Act. Finally, and in the alternative, it was the contention of Encik Abdul Razak that even if the assignment in this case was absolute, the plaintiff still had the right to sue the 1st defendant for the debt because of the following Clause 7 in the two relevant deeds of assignment:

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It is further agreed that this deed of assignment is without prejudice to the right of the bank to take legal action at any time against the assignor for the recovery of the banking facilities or any part thereof together with interest thereon.

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Mr. Balaguru, Counsel for the defendants, on the other hand, referred to the following passages at pp. 696 and 697 in Vol., I of *Chitty on Contracts* 25th Edn.:

And an assignment of all moneys due or to become due from the debtor, which was expressed to be by way of continuing security for all moneys due from the assignor to the assignee, has been held to be absolute (*Huges v. Pumphouse Hotel Co.* [1902] 2 KB 190. ... The fact that the assignment is expressed to be way of security for a loan does not by itself prevent it from being absolute, though combined with other factors such expressions may have this effect (*Mercantile Bank of London Ltd. v. Evans*) [1899] 2 QB 613, 616 & 617. The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument, but in construing it, the Court will look at the whole of its language.

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Counsel contended that the assignor in this case had given away all its rights. He agreed, however, that Clause 7 in the deeds of assignment was very wide but stated that the defendant could not sue the principal debtors.

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As pointed out by the Federal Court in *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] CLJ (Rep) 231 whether or not an agreement is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956, is to be gathered only from the four corners of the instrument itself. Now, in this case, the two assignments of 12 October 1983, were in the form of a deed signed by the 1st defendant as assignor and the plaintiff as assignee. After reciting (a) that the assignor has been awarded the Malacca Seafront Reclamation Project to the value of RM12,000,000 and RM15,470,000 payable by Messrs Pembinaan Bandar Melaka Sdn. Bhd. and Messrs Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. and (b) that the assignor has requested the assignee to provide banking facilities to enable the assignor to perform the said contracts and the assignee has agreed to provide banking facilities in the form of overdraft facility up to the sum of RM2,800,000 with interest at 2½% above the plaintiff's base lending rate, the 1st defendant duly executed the deeds of assignment providing, *inter alia*, as follows:

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- a** 1. In consideration of the bank advancing to the assignor the principal sum of Dollars Ringgit Two Million And Eight Hundred Thousand only (RM2,800,000) the assignor assigns to the bank all monies interest and right now or hereafter become due and payable to the assignor by the Messrs Pembinaan Bandar Melaka Sdn. Bhd. [Messrs Pembinaan Kota Laksamana (Melaka) Sdn. Bhd.)] under the said Contract.
- b** 2. In the event that no monies or interest is received by the bank under the assignment under Clause 1 above, or if the moneys actually received do not fully satisfy the principal sum with interest thereon the whole principal sum and interest or part thereof that remained unpaid shall become due and immediately repayable.
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- c** 4. The assignor further covenants that any receipt issued by the bank in respect of any payment made by Messrs Pembinaan Bandar Melaka Sdn. Bhd. [Messrs Pembinaan Kota Laksamana (Melaka) Sdn. Bhd.)] as hereinbefore mentioned shall be a sufficient and valid discharge.
5. In the event of the bank receiving any monies in excess of the principal sum and the accrued interest thereon at two and a half per centum above BBMB Base Lending Rate the bank agreed to refund after deducting all the necessary incidental expenses any such excess to the assignor forthwith or as soon as it is practicable.
- d** and after the signatures by the parties there were the following indorsements:
- (1) We, Messrs Pembinaan Bandar Melaka Sdn. Bhd. hereby acknowledge the existence of the assignment agreeing to credit all proceeds of the contract direct into Kejuruteraan Hong Huat Sdn. Bhd. account No:001-18846-86 with you.
- Pembinaan Bandar Melaka Sdn.Bhd.
- e** (Signed)
- (2) We, Messrs Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. hereby acknowledge the existence of the assignment agreeing to credit all proceeds of the contract direct into Kejuruteraan Hong Huat Sdn. Bhd.'s account no:001 18846-86 with you.
- Pembinaan Kota Laksamana (Melaka) Sdn. Bhd. (Signed).
- f** Looking at the whole of the deeds of assignment of 12 October 1983, it was my opinion that the documents were absolute assignments and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act. The assignments were absolute in the sense that the assignor intended to transfer to the assignee "all moneys, interest and rights now or hereafter become due and payable to the assignor". Even any receipt issued by the bank in respect of any payment would be a sufficient and valid discharge and the debtors
- g** in each case have acknowledged the existence of the assignment and agreed to credit all proceeds of the contracts direct into the 1st defendant's account with the plaintiff. The debtors therefore knew to whom they had to pay their debts.
- However, if I was wrong in my opinion that the assignments were absolute, nevertheless, the above-quoted Clause 7 of the deeds of assignment gave the plaintiff the right to take
- h** legal action at any time against the assignor itself for the recovery of the banking facilities or any part thereof together with interest thereon without having to enforce the securities given under the said loan agreement. In all the circumstances I therefore allowed the appeal against the decision of the learned Senior Assistant Registrar and gave liberty to the plaintiff to sign judgment as prayed for against the 1st, 4th and 5th defendants.
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